EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 158

December 2012

El-Masri v. "the former Yugoslav Republic of Macedonia" [GC] - 39630/09

Judgment 13.12.2012 [GC]

Article 3

Degrading treatment

Inhuman treatment

Torture

Effective investigation

Extradition

Torture and inhuman and degrading treatment during and following applicant's extraordinary rendition to CIA: *violations*

Article 5

Article 5-1

Lawful arrest or detention

Detention during and following operation involving extraordinary rendition to CIA: *violations*

Facts – The applicant, a German national, alleged that on 31 December 2003 he boarded a bus for Skopje. At the Macedonian border a suspicion arose as to the validity of his passport. He was questioned by the Macedonian authorities about possible ties with several Islamic organisations and groups. Later he was taken to a hotel room in Skopje where he was held for twenty-three days. During his detention, he was watched at all times and interrogated repeatedly. His requests to contact the German embassy were refused. On one occasion, when he stated that he intended to leave, a gun was pointed at his head and he was threatened. On the thirteenth day of his confinement, the applicant commenced a hunger strike to protest against his continued detention. On 23 January 2004, handcuffed and blindfolded, he was put in a car and taken to Skopje Airport.

There he was placed in a room, beaten severely by several disguised men, stripped and sodomised with an object. After a suppository had been forcibly administered, he was placed in a nappy and dressed in a dark blue short-sleeved tracksuit. Then, shackled and hooded, and subjected to total sensory deprivation, he was forcibly marched to a CIA aircraft, which was surrounded by Macedonian security agents who formed a cordon

around the plane. When on the plane, the applicant was thrown to the floor, chained down and forcibly tranquillised. While in that position, the applicant was flown to Kabul (Afghanistan) where he was held captive for five months.

On 29 May 2004 the applicant was returned to Germany via Albania. In October 2008 the applicant lodged a criminal complaint with the Skopje public prosecutor's office, but this was rejected as being unsubstantiated.

Law – The applicant's allegations were contested by the respondent Government on all accounts. However, after drawing inferences from the available material and the authorities' conduct and in the absence of any satisfactory and convincing explanation from the Government, the Court found them established beyond reasonable doubt.

Article 3

(a) *Procedural aspect*: By filing the criminal complaint, the applicant had brought to the public prosecutor's attention his allegations that State agents had subjected him to ill-treatment and had been actively involved in his subsequent rendition by CIA agents. His complaints had been supported by the evidence which had come to light in the course of the international and other foreign investigations. He had thus laid the basis of a prima facie case of misconduct on the part of the security forces of the respondent State, which had warranted an investigation. However, almost two and a half months later the public prosecutor had rejected the complaint for lack of evidence. Apart from seeking information from the Ministry of the Interior, she had not taken any steps to examine the applicant's allegations. Moreover, although the applicant's allegations regarding the timing and manner of his transfer to Afghanistan had been strikingly consistent with the actual course of the aircraft concerned, the investigators had remained passive and had not followed up that lead, considering instead that no other investigatory measures were necessary. In view of the considerable, at least circumstantial, evidence available when the applicant submitted his complaint, such a conclusion fell short of what could be expected from an independent authority.

Another aspect of the inadequate character of the investigation was its impact on the right to the truth regarding the relevant circumstances of the case. The case was of great importance not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" had attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the UN human rights bodies, the Council of Europe and the European Parliament. The concept of "State secrets" had often been invoked to obstruct the search for the truth. State secret privilege had also been asserted by the US Government in the applicant's case before the US courts. Despite the undeniable complexity of the circumstances surrounding the present case, the respondent State should have endeavoured to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts. Therefore, the summary investigation that had been carried out in this case could not be regarded as effective.

Conclusion: violation (unanimously).

(b) *Substantive aspect*

(i) *Treatment in the hotel* – The applicant had undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate during the interrogation sessions to which he had been subjected. Furthermore, such treatment had intentionally been meted out with the aim of extracting a confession or information about his alleged ties with terrorist organisations. The applicant's suffering had also been increased by the secret nature of the operation and the fact that he had been kept incommunicado for twenty-three days

in a hotel, an extraordinary place of detention outside any judicial framework. Therefore, the treatment to which the applicant had been subjected while in the hotel had amounted on various counts to inhuman and degrading treatment.

Conclusion: violation (unanimously).

(ii) *Treatment at the airport* – The same pattern of conduct applied in similar circumstances had already been found to be in breach of Article 7 of the UN International Covenant on Civil and Political Rights. Although the applicant had been in the hands of the special CIA rendition team, the acts concerned had been carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State had to be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities. The applicant had not posed any threat to his captors. Thus, the physical force used against him at the airport had been excessive and unjustified in the circumstances. The measures had been used in combination and with premeditation, with the aim of causing severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant. Such treatment amounted to torture. It followed that the respondent State must be considered directly responsible for the violation of the applicant's rights under this head since its agents had actively facilitated the treatment and failed to take any necessary steps to prevent it from occurring.

Conclusion: violation (unanimously).

(iii) *Removal of the applicant* – There was no evidence that the applicant's transfer into the custody of CIA agents had been pursuant to a legitimate request for his extradition or any other legal procedure recognised in international law for the transfer of a prisoner to foreign authorities. Nor had any arrest warrant been shown to have existed at the time authorising the applicant's delivery into the hands of US agents. Further, the evidence suggested that the Macedonian authorities had had knowledge of the destination to which the applicant would be flown from Skopje Airport. They were also aware or ought to have been aware that there was a real risk that the applicant would be subjected to treatment contrary to Article 3, as various reports had been published at the time concerning practices resorted to or tolerated by the US authorities that were manifestly contrary to the principles of the Convention. Lastly, the respondent State had not sought any assurances from the US authorities to avert the risk of the applicant being ill-treated. Accordingly, having regard to the manner in which the applicant had been transferred into the custody of the US authorities, the Court considered that he had been subjected to "extraordinary rendition", that is, an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.

Conclusion: violation (unanimously).

Article 5

(a) *Substantive aspect*

(i) *Detention in Skopje* – The applicant's confinement in the hotel had not been authorised by a court or substantiated by any custody record. The applicant had not had access to a lawyer, or been allowed to contact his family or a representative of the German Embassy and he had been deprived of any possibility of being brought before a court to test the lawfulness of his detention. It was wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework. The applicant's unacknowledged and incommunicado detention in such a highly unusual location as a

hotel had added to the arbitrariness of the deprivation of liberty. This constituted a particularly grave violation of his right to liberty and security.

(ii) *Subsequent detention* – In the present case, the applicant had been subjected to "extraordinary rendition", which entailed detention outside the normal legal system and which, by its deliberate circumvention of due process, was anathema to the rule of law and the values protected by the Convention. Furthermore, the detention of terrorist suspects within the "rendition" programme run by the US authorities had already been found to have been arbitrary in other similar cases. In such circumstances, it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant had faced a real risk of a flagrant violation of his rights under Article 5. The Macedonian authorities had not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of that provision, they had also actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they had been aware or ought to have been aware of the risk of that transfer.

Having regard to the above, the applicant's abduction and detention had amounted to "enforced disappearance" as defined in international law. The respondent Government was to be held responsible for violating the applicant's rights under Article 5 of the Convention during the entire period of his captivity.

Conclusion: violation (unanimously).

(b) *Procedural aspect*: The Court had already found under Article 3 that the respondent State had not conducted an effective investigation into the applicant's allegations of ill-treatment. For the same reasons, it found that no meaningful investigation had been conducted into the applicant's credible allegations that he had been detained arbitrarily.

Conclusion: violation (unanimously).

The Court also found violations of Articles 8 and 13 of the Convention.

Article 41: EUR 60,000 in respect of non-pecuniary damage.

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